YIT HON KIT v. MINISTER OF HOME AFFAIRS, MALAYSIA & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) April 4, 11 and June 2, 1986]

[Penang – Criminal Application No. 54-3-86]

Administrative Law – Habeas corpus ad subjiciendum – Whether detention lawful – Whether informed of grounds of arrest "as soon as may be" – Whether grounds of arrest sufficient and valid – Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1) & 4(1) – Federal Constitution, Art. 5.

Constitutional Law – Habeas corpus and subjiciendum – Whether detention lawful – Whether informed of grounds of arrest "as soon as may be" – Whether grounds of arrest sufficient and valid – Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1) & 4(1) – Federal Constitution, Art. 5.

This was an application for a writ of *habeas corpus* ad *subjicendum* whereby the applicant challenged both the validity of a detention order dated February 17, 1986, made against him pursuant to the provisions of section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") and his detention thereunder.

Held, allowing the application: (1) it is of first importance for a person arrested under section 3(1) to know, at the earliest possible moment, by virtue of what power he is being arrested. He must also be informed, at the same time, of the grounds of his arrest;

(2) in the present case, there was an improper arrest and detention under section 3(1) for non-compliance with the first limb of Article 5(3) of the Constitution and that in any event, the applicant's detention during the period when enquiries under section 3(1) ended and detention under section 4(1) began was unlawful;

(3) furthermore, the criminal activities alleged against the applicant are too remote in point of law to justify the making of the detention order.

[*Editorial Note:* An appeal to the Supreme Court in this case was withdrawn on August 23, 1986.]

Cases referred to:

(1) *Yeap Hock Seng* v. *Minister of Home Affairs, Malaysia* [1975] 2 M.L.J. 279.
(2) *Liversidge* v. *Anderson* [1942] A.C. 206, 244.
(3) *Re Datuk James Wong Kim Min* [1976] 2 M.L.J. 245, 251.
(4) *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur* [1976] 2 M.L.J. 156.
(5) *Aminah* v. *Superintendent of Prisons, Pengkalan Chepa, Kelantan* [1968] 1 M.L.J. 92.
(6) *Assa Singh* v. *Mentri Besar, Johore* [1969] 2 M.L.J. 30.
(7) *Tarapade* v. *State of West Bengal* [1959] S.C.R. 212.
(8) *Vimal Kishore* v. *The State of U.P.* A.I.R. 1956 All 56.
(9) *P.E. Long & Ors.* v. *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors.* [1976] 2 M.L.J. 133.
(10) *Ooi Ah Phua* v. *Officer-in-charge of Criminal Investigation, Kedah/Perlis* [1975] 2 M.L.J. 198.
(11) *Lee Mau Seng* v. *Minister for Home Affairs, Singapore & Anor.* [1971] 2 M.L.J. 137, 141.
(12) *Christie* v. *Leachinsky* [1947] A.C. 573, 592.
(13) *Dr. Ram Krishan Bhardwaj* v. *The State of Delhi & Ors.* A.I.R. 1953 S.C. 318, 320.
(14) *Reverend Thomas Pelham Dale's case* (1881) 6 Q.B.D. 376.
(15) *Re Tan Boon Liat* [1977] 2 M.L.J. 108, 111.
(16) *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 M.L.J. 129.
(17) *Athappen a/l Arumugam* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1984] 1 M.L.J. 67.
(18) *Abdul Jabar* v. *State of J. & K.* A.I.R. 1957 S.C. 281, 283.
(19) *Sk. Serajul* v. *State of West Bengal* [1975] 2 S.C.C. 78.
(20) *Jagan Nath Biswas* v. *The State of West Bengal* A.I.R. 1975 S.C. 1516 (para 2).
(21) *Md. Sahabuddin* v. *The District Magistrate 24 Parganas & Ors.* A.I.R. 1975 S.C. 1722.
(22) *Ranjit* v. *State of West Bengal* A.I.R. 1972 S.C. 1753.
(23) *J.N. Roy* v. *State of West Bengal* A.I.R. 1972 S.C. 2143.
(24) *Samaresh* v. *D.M.* A.I.R. 1972 S.C. 2481.
(25) *Dulal Roy* v. *The District Magistrate, Burdwan & Ors.* A.I.R. 1975 1 S.C.C. 837; A.I.R. 1975 S.C. 1508.
(26) *R.* v. *Halliday* [1917] A.C. 260.
(27) *Greene* v. *Secretary of State for Home Affairs* [1942] A.C. 284.
(28) *R.* v. *Inland Revenue Commissioners, Ex parte Rossminster* [1980] A.C. 952, 1011.
(29) *Ridge* v. *Baldwin* [1964] A.C. 40, 73.
(30) *The Secretary of State for Employment* v. *Associated Society of Locomotive Engineers and Firemen & Ors.* (No. 2) [1972] I.C.R. 34; [1972] 2 All E.R. 951, 982.
(31) *Reg.* v. *Secretary of State for the Home Department, Ex parte Khawaja* [1983] 2 W.L.R. 321, 343; [1984] A.C. 74, 110.

CRIMINAL APPLICATION.

Yusof Khan bin Ghous Khan for the applicant.

Zaleha bte Zahari (Senior Federal Counsel) for the first and second respondents.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: This is an application by Yit Hon Kit ("the applicant") for a writ of *habeas corpus ad subjiciendum* whereby he challenges both the validity of a detention order dated February 17, 1986, made against him pursuant to the provisions of section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 ("the Ordinance") and his detention thereunder.

The impugned order ("IBA 1") was in the following terms:

"That I, the Minister of Home Affairs, being satisfied that the order is necessary to be imposed on the person named below with a view to prevent him from committing any acts that may be prejudicial to public order or for the suppression of violence or for the prevention of crimes involving violence.

Name: YIT HON KIT *NRIC No:* 8218951

By reasons therefore and in exercising the powers conferred on me pursuant to section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, I hereby through this order order that the person abovenamed be detained for two years from February 23, 1986 at the Rehabilitation Centre, Pulau Jerjak or at any other place that may be ordered by me from time to time."

Signed this February 17, 1986.

[*Rubber Stamp Impression*] t.t.

Dato' Radzi Tan Sri Sheikh Ahmad
(Dato' Radzi Tan Sri Sheikh Ahmad)
Timbalan Menteri Hal Ehwal Dalam Negeri,
Malaysia.

The grounds upon which the impugned order was made ("the grounds" – "IBA 2") were as follows:

"That you are a leader of a secret society and have committed violent criminal acts which have threatened public order."

The allegations of fact upon which the impugned order was based ("the allegations of fact" – "IBA 2") were as follows:

"1. That you are a leader of a secret society known as 'Ang Siang' which has actively operated in the town of Teluk Intan, especially so in the area along Jalan Hoo Siak Hong, since 1983.

2. That you are responsible for ordering members of your society to recruit new members as well as to collect protection money from the shop-keepers in the town of Teluk Intan.

3. That you were directly involved in ordering members of your society to murder a man along Jalan Sultan Abdullah, Teluk Intan in 1984."

The allegations of fact were amplified somewhat in paragraph 9 of the affidavit of Encik Ibrahim bin Abdullah, an Assistant Secretary attached to the Ministry of Home Affairs and responsible for the processing of the applicant's case file, affirmed to on April 2, 1986 (enclosure 8). In that paragraph he alleged, significantly (for reasons which will become apparent later), that "... from record, the applicant returned to Teluk Intan periodically *during the years 1983 and 1984* to carry out his illegal activities as stipulated in 'IBA2', the details of which cannot be disclosed as it may lead to the identification of the informant whose identity must be protected." (The emphasis is mine.)

For brevity and convenience, unless otherwise stated, all references to sections in this judgment are to the Ordinance.

According to the affidavit evidence, it appears that the applicant was arrested at 10 a.m. on December 24, 1985, at his home in Selayang, Selangor, by Inspector Ng Siew Thiam of the Anti-Secret Societies section of the Rawang police station, Selangor, not for secret society activities generally but for suspicion of involvement in the murder of a man at Jalan Sultan Abdullah, Teluk Intan, in the year 1984. However, the applicant was never charged for that murder and we do not know why.

Be that as it may, on the same day, at about 5 a.m. the applicant was handed over to Inspector Tai Cheng Boon attached to the Anti-Secret Societies section of the Teluk Intan police station and taken there for further investigations and action.

Oral evidence adduced before me, pursuant to a notice to cross-examine dated April 3, 1986, disclosed that the applicant remained in custody in the lockup there until about 8.05 a.m. on December 26, 1985, when P.C. Hosni Bin Tahir, attached to the Anti-Secret Societies Office, Teluk Intan police station, acting on instructions from his superior, Inspector Tai Cheng Boon, took him out of the lockup and brought him to that office which was about 40 feet away. P.C. Hosni then effected formal arrest for purposes of section 3(1) and made a report (exhibit "HBT1" enclosure 9) at about 8.10 a.m. on the same day, a translation whereof reads as follows:

"I believe from the available proof there are grounds of detain the subject Yit Hon Kit Identity Card No: 8218951 Age: 30 years. Address: No. 139A, Salak South, Kuala Lumpur. He was arrested at: Police Station, Teluk Intan, Perak.

On: 26/12/85 Time: 8.10 a.m. Arrested under section 3(1) Emergency Ordinance 5/69, for further investigation.

Signature
(Hosni Bin Tahir) D. Const. 66249"

P.C. Hosni next confirmed a fact of no little importance. He said that the only instructions he received from Inspector Tai were to bring the

applicant out of the lockup, arrest him and make a report. There were no other instructions. So he merely carried out those instructions. He then confirmed, "Yes, that was why I did not tell applicant of reasons for arrest."

The applicant was, at the time of service of the detention order, informed through a Cantonese interpreter of his right to make representation to the Advisory Board and furnished with a copy of the grounds and allegations of fact in compliance with section 5(2).

That, in brief outline, is a summary of the events which gave rise to this application.

The applicant has protested his innocence and categorically denied the allegations of fact upon which the detention order was grounded. But, as Abdoolcader J. (as he then was) said in *Yeap Hock Seng* v. *Minister of Home Affairs, Malaysia*:[1]

"It is not open to me to entertain the protestations of the applicant that he is innocent of the allegations made against him and that he is not a person who has acted or would act in any way prejudicial to public interest or resort to violence."

But he has also alleged, as he was entitled to, that the detention order passed against him was vitiated by *mala fides*, that the grounds on which it was made do not fall within the scope of the Ordinance and that the conditions precedent for its making had not been fulfilled.

In *Liversidge* v. *Anderson*[2] Lord Atkin sounded the clarion call:

"It has long been one of the pillars of freedom... that the judges are no respecters of persons and stand between the subject and any attempted encroachments on his liberty by the executive, alert to see that any coercive action is justified by law."

A matter of deprivation of liberty therefore requires meticulous compliance with the law for as Lee Hun Hoe C.J. (Borneo) put it, in *Re Datuk James Wong Kim Min*[3] at p. 251:

"In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty..."

The then Federal Court in that case unanimously upheld the release of one detained in West Malaysia under an Ordinance found to be valid only in Sarawak. Similarly, in *Andrew s/o Thamboosamy* v. *Superintendent Of Pudu Prisons, Kuala Lumpur*[4] Suffian L.P. said this:

"... we agree that any form of detention does violence to section 5(1) of the Constitution... and hence power given by law to detain must be construed strictly and in case of doubt or ambiguity the court should lean in favour of the subject."

His Lordship, however, added:

"...if the government exercises a *power conferred on it by Parliament and keeps within the law,* then the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the (individual affected). His remedy is then not judicial but political and administrative."

(The emphasis is mine.)

It is with the above principles in mind that I turn to examine the particular circumstances of this case.

The very first point taken by counsel for the applicant was that the evidence disclosed a violation of the first limb of Article 5(3) of the Constitution in that the applicant was not informed "as soon as may be" of the grounds of his arrest, that in consequence his arrest and detention under section 3(1) were improper and that the detention order passed against him under section 4(1) should be set aside.

The portions of Article 5 of the Constitution, so far as material to this part of the case, read as follows:

"5. (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where a complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

(3) Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest..."

Clearly, the fundamental right under Article 5(3) applies to any person, including a person

arrested under section 3(1), for as Wan Suleiman J. (as he then was) said in *Aminah* v. *Superintendent Of Prisons, Pengkalan Chepa, Kelantan*[5] – "... Article 5 is clearly meant to apply to arrests under any law whatsoever in force in this country". In *Assa Singh* v. *Menteri Besar, Johore,*[6] this view was upheld by the then Federal Court. This has, of course, now to be read subject to the addition in 1976 of the proviso in clause (4) which has the effect of excluding the application of Article 5(4) to the Restricted Residence Enactment. But the proviso leaves undisturbed the language in *Aminah* and *Assa Singh* that applied clause (3) to arrest under that Enactment.

Now, upon the facts outlined above, the applicant could only have become aware of the grounds for his arrest under section 3(1) at 10 a.m. on February 21, 1986, when he was served with a purported copy of the detention order, Form 13A and Form I, by Inspector Abdul Malik Bin Abu Bakar who also explained to him their contents through an interpreter in the Cantonese dialect. A period of 57 days had therefore elapsed between the applicant's arrest and his being informed of the grounds thereof.

In *Aminah's* case[5] Wan Suleiman J. citing *Tarapade* v. *State Of West Bengal*[7] said:

"... the words 'as soon as may be' appearing in Article 22(1) of the Indian Constitution (and Article 5(3) of ours) means (sic) as nearly as is reasonable in the circumstances of the particular case."

It follows, that the imprecision of the phrase "as soon as may be" in Article 5(3) makes the determination of each case turn upon its own facts.

In my view, it is impossible to hold, having regard to the inordinate delay of 57 days, that there has been here a sufficient compliance with the first limb of its requirements.

But the question arises whether a violation of the first limb of Article 5(3) of the Constitution can be condoned, having regard to the fact that the applicant was made aware of the grounds of his arrest at a much later stage when a purported copy of the detention order and connected documents were served on him under section 4(4).

I am of the view that there can be no such condonation and I need no more than refer to the following passages in the judgment of Desai J. in *Vimal Kishore* v. *The State Of U.P.*[8] at p. 62, paragraph 34:

"On behalf of the state it was contended that in a *habeas corpus* proceeding a High Court is concerned with the question of the legality of detention on the date of return and not earlier. The applicant has been told of the grounds for his arrest in the return. Now he knows why he was arrested and is being detained, it was, therefore, argued that he cannot be released on *habeas corpus* now. I am afraid the argument is fallacious.

The law is not that detention following arrest is illegal so long as the grounds for the arrest are not communicated to the person; it is that he must be informed of the grounds for arrest 'as soon as may be', and once there has been a failure to do so, his detention becomes illegal once for all. Informing him of the grounds at a later stage is no satisfaction of his fundamental right and is as good as not informing him at all."

The learned judge continued in these terms:

"... The reason for the arrest was within the knowledge of the person arresting him and there was nothing to prevent its being communicated to him.

If he could be informed at the moment of his arrest of the grounds for his arrest, it means that he was not informed 'as soon as may be'. Informing him through the return cannot possibly be said to be 'as soon as may be'. The very nature of the right conferred and the reason for the conferment of the right prevent effective communication of the grounds of arrest to an arrested person with the slightest delay; once the moment when he could be informed of the grounds has passed, it is impossible to inform him with retrospective effect or to comply with the requirement of the Constitution."

I must next mention an attempt made by the learned Senior Federal Counsel to persuade me that a breach of the first limb of Article 5(3) would not result in the detention order being set aside. In this connection, I was referred to a judgment of Arulanandom J. in *P.E. Long & Ors.* v. *Menteri Hal Ehwal Dalam Negeri Malaysia & Ors.*[9] where a similar complaint had been made but the court had found on the facts that the applicants *had been duly informed orally of the grounds of their arrest.* The learned judge did, however, go on to refer, by way of *obiter dicta,* to the judgment of the Federal Court in *Ooi Ah Phua* v. *Officer-In-Charge Of Criminal Investigation, Kedah/Perlis*[10] in these terms:

"In view of this judgment and my earlier findings on the question of arrest there is no merit in this ground and for purposes of this application cannot succeed. Hence at this stage any complaint about the arrest of the applicants would appear to be purely academic and of no relevance to an application for a writ of *habeas corpus* against the detention of the applicants by order of the Minister of Home Affairs."

Ooi Ah Phua's case was concerned solely with a complaint of denial of the right of access to

counsel. The Federal Court found, on the facts, that the police officer who had arrested the applicant's son, because of suspected involvement in a robbery, not only had the power but was under a duty to do so. Moreover, by the time the application for *habeas corpus* came on for hearing the son had been detained by order of a magistrate so that there could be no question of the detention being unlawful. The judgment ended with the observation at p. 201, column 2, paragraphs A to B:

"In any event I do not think that *habeas corpus* is the right remedy for the applicant if his only complaint is that after his son Ooi's arrest his solicitor was denied immediate access to Ooi. The juxtaposition of clauses (2) and (3) of Article 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of *habeas corpus*, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer."

With all the respect to the learned judge who decided *Long*'s case, I do not therefore consider *Ooi*'s case of any relevance to the issue before him. A complaint of failure to inform the person arrested of the grounds of his arrest, contrary to the first limb of Article 5(3), if substantiated, can render his subsequent detention unlawful.

However, a complaint by a person while under lawful detention by the police that he has been refused access to counsel, contrary to the second limb of Article 5(3), as in *Ooi Ah Phua*'s case, will not have that effect and is not therefore one for which the proper remedy is *habeas corpus*. As Wee Chong Jin C.J. (Singapore) put it in *Lee Mau Seng* v. *Minister For Home Affairs, Singapore & Anor.*[11] at p. 141, column 2, paragraphs C, D, E:

"In my judgment *habeas corpus* is not an available remedy to a person who, after his arrest by the police and under lawful detention by the police under powers conferred by section 74 of the Act, has been refused by the police to be allowed his constitutional right under Article 5(3) of the Constitution to be allowed to consult a legal practitioner of his choice. Such a person must seek other available remedies such as may be found in section 18(2) and the First Schedule of the Supreme Court of Judicature Act (Cap. 15)."

Having said that, the further question arises whether an improper arrest under section 3(1) is sufficient for the detention order to be set aside. Unfortunately, it appeared to be assumed by counsel for the applicant that this question had to be answered in favour of the applicant and, as a result, the point was never developed during the argument. It therefore became necessary for me to make my own researches into the matter.

I would start by reminding myself that the rule enshrined in the first limb of Article 5(3) that a person on being arrested must be informed of the grounds for his arrest (save in exceptional circumstances) is similar to the common law rule applying in England and enunciated by Lord Simonds in *Christie* v. *Leachinsky*[12] at p. 592 in these terms:

"Blind, unquestioning obedience is the law of tyrants and of slaves: it does not yet flourish on English soil... Arrested with or without a warrant the subject is entitled to know why he is deprived of his freedom, if only in order that he may, without a moment's delay, take such steps as will enable him to regain it."

And Viscount Simon L.C., another member of the court, went on to explain the reason behind the rule when he said this at p. 586 F:

"If the charge on suspicion of which the man is arrested is then and there made known to him he has the opportunity of giving an explanation of any misunderstanding or of calling attention to other persons for whom he may have been mistaken with the result that further enquiries may save him from the consequences of false accusation."

The House of Lords attached so much weight to the rule that an arrested person must be informed, at the time of his arrest, of the ground for his arrest that though there existed at the time of Leachinsky's arrest a valid ground for arrest, they held the arrest and subsequent detention unlawful merely because he was told that he was arrested on account of some other ground which did not justify the arrest.

Accordingly, it is of the first importance for a person arrested under section 3(1) to know, at the earliest possible moment, by virtue of what power he is being arrested. If he is denied this information, he will not know what his rights and remedies are to challenge his arrest; he would in effect be blind-folded. He must also be informed, at the same time, of the grounds of his arrest.

It follows, there is no doubt that the court can enquire into the question whether the Minister, in the circumstances of a particular case, has validly exercised the power to make the detention order.

I am fortified in this view by the following passages in the judgment of Suffian L.P. in *Andrew s/o Thamboosamy* v. *Superintendent of Pudu Prisons, Kuala Lumpur*[4] which merit repetition:

"... we agree that any form of detention does violence to Article 5(1) of the Constitution... and hence power given by law to detain must be construed strictly and in case of doubt or ambuiguity the court should lean in favour of the subject."

"... if the government exercises a *power conferred on it by Parliament and keeps within the law*, then the duty of the court is quite clear; the court should simply apply the law, no matter how harsh its effect may be on the (individual affected). His remedy is then not judicial but political and administrative."

(Emphasis supplied)

And in *Re Datuk James Wong Kim Min*[3] at p. 251, Lee Hun Hoe C.J. (Borneo) said this:

"... If this Constitutional guarantee (Article 5) is to have any real meaning at all, then it is imperative that the court should intervene whenever the liberty of the subject is encroached upon not in accordance with the law."

And, this is what the Supreme Court in India said in *Dr. Ram Krishan Bhardwaj* v. *The State Of Delhi And Others*:[13]

"Preventive detention is a serious invasion of personal liberty and such meagre safeguards as the Constitution has provided against the improper exercise of the power must be jealously watched and enforced by the court."

The question which therefore arises for decision as regards this part of the case is whether upon the facts hereinbefore mentioned, the power to make the detention order against the applicant had been validly exercised.

Now, the applicant was served with a detention order under section 4(1) which empowers the Minister to detain *any person* for a period not exceeding two years if he is satisfied as to the matters laid down therein.

It goes without saying that the expression "any person" includes a person arrested under section 3(1) and held in custody "pending enquiries" because it is believed that there may be grounds which would justify his detention under section 4(1). The applicant was such a person but, for the reasons already stated, his arrest under section 3(1) was improper by reason of a violation of the first limb of Article 5(3) of the Constitution.

In these circumstances, did the Deputy Minister have the power to make a detention order under section 4(1) against a person who, on the date of its coming into force, was being unlawfully detained by reason of an improper arrest under section 3(1)? If so, it would amount to a denial to a person unlawfully detained of a fundamental right guaranteed under the Constitution and a negation of justice. I am afraid I am not prepared to find that the legislature could have intended to confer such a drastic power on the detaining authority in the absence of words which are crystal clear. If Parliament had really meant to confer such a power, it could have said so without the slightest difficulty and not left a point which is so fundamental to be arrived at by inference. I would accordingly answer the question posed in the negative.

There was another flaw in the process leading to the applicant's detention under section 4(1). In order to appreciate the point involved, it is necessary to reproduce the material portions of the Ordinance; they are as follows:

"Power to detain suspected persons.

3.(1) Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under section 4(1).

(3) Any person arrested and detained under this section may be detained in police custody for a period not exceeding sixty days without an order of detention having been made in respect of him under section 4(1)."

Power to order detention.

4.(1) If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a 'detention order') directing that that person be detained for any period not exceeding two years."

Representations against detention order.

5.(1) A copy of every detention order shall as soon as may be after the making thereof be served on the person to whom it relates, and every such person shall be entitled to make representations against the order to an Advisory Board."

I have already mentioned, when giving a brief outline of the facts of this case, that the applicant was arrested under section 3(1) by P.C. Hosni at 8.10 a.m. on December 26, 1985. He was then detained "pending enquiries" and the maximum period for this purpose without an order of detention having been made against him under section 4(1) could not exceed 60 days: section 3(3).

It will be recalled that it was on January 31, 1986 that the police applied for and obtained a detention order dated February 17, 1986 under section 4(1) (see para. 4 of affidavit of Encik Ibrahim bin Abdullah dated April 2, 1986, being

enclosure 8) which provided for the applicant's detention for a period of two years with effect from February 23, 1986. A copy of the detention order and the connected documents were served on the applicant at 10 a.m. on February 21, 1986 in purported compliance with section 5(1).

In these circumstances, putting the matter at its highest, police enquiries under section 3(1) could, at most, have continued up to the time of the service of the detention order, namely, at 10 a.m. on February 21, 1986, but no longer.

Those being the facts, by what authority was the applicant being detained from 10 a.m. on February 21, 1986 until midnight on February 22, 1986. I am afraid I can find none. If this conclusion is correct, then the question arises how does this affect the detention order under section 4(1)?

In the *Reverend Thomas Pelham Dale*'s case[14] Brett L.J. said this:

"Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, *all* of which are entirely regular, and that if he fails to follow *every step* in the process with extreme regularity the court will not allow the imprisonment to continue."

(Emphasis added)

And this is what Cotton L.J. said at p. 469, 470:

"I quite agree with Brett L.J. that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be *matters of mere form.*"

(Emphasis added)

In *Re Tan Boon Liat*[15] Lee Hun Hoe C.J. (Borneo) referred to both the above passages with approval.

On this further ground also the detention order should be set aside.

To summarize this part of the case, I find that there was an improper arrest and detention under section 3(1) for non-compliance with the first limb of Article 5(3) and, that in any event, the applicant's detention during the period when enquiries under section 3(1) ended and detention under section 4(1) began was unlawful.

In these circumstances, it cannot be said that the detention of the applicant under section 4(1) was procured by steps, "*all* of which were entirely regular". Nor for that matter was "*every step* in the process" of such detention followed "with extreme regularity". Similarly, I could not say that the detaining authority had "strictly followed the powers under which it was assuming to act". Accordingly, both the flaws referred to are, in my opinion, sufficient to vitiate the applicant's detention under section 4(1).

The applicant is, however, on even firmer ground as regards yet another matter. His counsel drew my attention to the fact that in the instant case the copy of the detention order exhibited to the affidavit of Encik Ibrahim Bin Abdullah and that served on the applicant were purported copies bearing no signature of the Minister or his Deputy but only a seal of the Ministry of Home Affairs and a rubber stamp impression of the words: "t.t. Dato' Radzi Tan Sri Sheikh Ahmad" immediately under which were the typewritten bracketed words: "Dato' Radzi Tan Sri Sheikh Ahmad" and immediately under that the printed words: "Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia". The seal and rubber stamp could, of course, have been affixed by anyone at any time.

It was accordingly submitted that the absence of the signature of the Deputy Minister in the purported copies of the detention order aforesaid was a fatal omission.

The Senior Federal Counsel replied that the original signed detention order was with the Superintendent, Pusat Pemulihan Akhlak, Pulau Pinang, the second respondent herein, and he was the proper person to retain the same as, if any question arose as to the legality of the applicant's detention, he would have to answer for it and this he could only do by producing the original document. However, although the legality of the applicant's detention was in question in these proceedings, and express objection *in limine* had been taken to the non-production of the detention order or a duly authenticated copy thereof, she made no application for an adjournment to rectify the omission.

In *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[16] at p. 141, column 2A, H.T. Ong C.J. said this:

"... in my opinion, production *by the respondent Minister* of *an order of detention* by him, *ex facie regular and duly authenticated,* constitutes a peremptory defence to any complaint of unlawful detention and places on the complainant the burden of establishing that the order is unwarranted, defective or otherwise invalid."

(The emphasis is mine.)

And this is what Suffian F.J. (as he then was) said in the same case of p. 152, column 1H:

"... the onus of proving the legality of the detention is on the Minister in the first instance. This he can discharge simply by producing the order of detention which, if its authenticity and good faith are not impugned, is a sufficient answer. If the detainee alleges *mala fides,* as he does here, then the onus shifts to him and it is for him to prove *mala fides.*"

In my opinion, the applicant is entitled to take advantage of any frailty appearing in the case for the respondents. The authorities cited earlier in this judgment make it abundantly clear that a procedure such as under the Ordinance, designed to lead to such draconian consequences, must be followed out strictly and to the letter. And especially is this so, since the courts in this country have adopted a restrictive approach to their role when considering applications for writs of *habeas corpus* in cases of preventive detention (see *Athappen a/l Arumugam* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia*[17]).

Clearly, the onus was on the detaining authority to cause to be produced in court either the original detention order or a duly authenticated copy thereof. I venture to suggest that in the present case the proper officer to authenticate such copy would be the Superintendent, Pusat Pemulihan Akhlak, Pulau Pinang, he being the person in whose custody the applicant is, who is a party to these proceedings and who it is said has the original detention order. This onus was never discharged and on this ground alone, the application for *habeas corpus* must be granted.

But there was also an onus on the Deputy Minister to cause to be served upon the applicant a copy of the detention order, the grounds thereof and the allegations of fact upon which it was based "*as soon as may be after the making thereof*" in accordance with the requirements of section 5(1) and (2).

In the present case, the alleged detention order was made on February 17, 1986, a purported unsigned and unauthenticated copy thereof and the connected documents aforesaid were served on the applicant at 10 a.m. on February 21, 1986 at the Teluk Intan police station. Upon these facts, was the applicant served with a copy of the detention order and the connected documents "as soon as may be" after the making thereof? Whenever the question of reasonableness arises in computing the period of time the court has perforce to have regard to the particular circumstances of the case in which the question arises for decision. It may not be possible in many cases to affirmatively say or to precisely quantify the period of time by reference to hours, days, or months, nevertheless, it is possible, having regard to the circumstances of the case, to say whether the thing done was or was not done "as soon as may be", *i.e.* within the time which was reasonably convenient or requisite: *Abdul Jabar* v. *State Of J. & K.*[18]

Here, I must have regard to the fact that at the time of service the applicant was readily available at the Teluk Intan police station. The detention order was issued in Kuala Lumpur and considering the machinery for despatch and service at the disposal of the detaining authority, it is difficult to hold (in the absence of an explanation) that service some four days after issue of the detention order was service effected "as soon as may be" within the meaning of section 5(1).

This was yet another flaw, and a serious one, in the process leading to the detention of the applicant under section 4(1). I say "serious" because without the detention order, grounds and allegations of fact, the detenu is prevented from exercising his right of making representations and this he must be allowed to do at the earliest opportunity.

That does not, however, determine the matter, for it was also alleged, *inter alia,* that the grounds of detention do not fall within the scope of the Ordinance and that the conditions precedent for the making of the detention order had not been fulfilled.

Most particularly, it was submitted before me that the allegations of fact, the effect of which was that the applicant had returned to Teluk Intan periodically during the years 1983 and 1984 to carry out his criminal activities stipulated therein, were so remote in point of time to the date of the making of the detention order dated February 17, 1986, that in the absence of an explanation for the delay (and there was none), it could not be said that the conditions precedent for the making of the detention order laid down in section 4(1) had been satisfied. This point was in fact taken in the

affidavit of Wan Pik Yoong, the applicant's wife, affirmed to on March 5, 1986 (enclosure 1) and filed in support of the application.

In *Yeap Hock Seng* v. *Minister for Home Affairs, Malaysia,*[1] Abdoolcader J. (as he then was) dealing with the question when the detaining authority may be justified in ordering the detention a person in view of his past activities observed:

"These past activities should, however, ordinarily be proximate in point of time to justify the detention order."

In *Sk. Serajul* v. *State of West Bengal,*[19] Bhagwati J. (as he then was) said at p. 80:

"It is the obligation of the state or the detaining authority in making its return to the rule in such a case to place all the relevant facts before the court and if there is any delay in making the order of detention or in arresting the detenu, which is *prima facie* unreasonable, the state must give reasons explaining the delay. Here there is no explanation for the delay which has occurred at both stages and in the absence of such explanation, we are not at all satisfied that the District Magistrate, Burdwan, applied his mind and arrived at a real and genuine subjective satisfaction that it was necessary to detain the petitioner with a view to preventing him from acting in a prejudicial manner. The condition precedent for making of the order of detention was, therefore, not satisfied, and consequently, the order of detention must be quashed and set aside."

And this is what Krishna Iyer J. said in *Jagan Nath Biswas* v. *The State of West Bengal*[20] when dealing with a case where there was a time lag of six months between the date of the detention order and the date of the last incident on which it was based:

"The incidents themselves look rather serious but also stale, having regard to the long gap between the occurrences and the order of detention. One should have expected some proximity in time to provide a rational nexus between the incidents relied on and the satisfaction arrived at. This court has repeatedly pointed out that unexplained and long delay will be fatal to the plea of subjective satisfaction."

And, again in *Md. Sahabuddin* v. *The District Magistrate 24 Parganas & Ors.*[21] Krishna Iyer J., dealing with a similar time lag of seven months, said this:

"... In any case, the order seemed to have been passed nearly seven months after the criminal incident. No explanation whatever in the shape of a counter affidavit by the District Magistrate or anyone else on behalf of the State has been filed. We have to presume that there is no explanation worthwhile offering.....

... On the basis that there is a long unexplained delay between the criminal occurrence and the detention order, this court has held that such detention must be held illegal because the subjective satisfaction has no proximate rational nexus with the prejudicial act. We have to follow the same view here also. The order of detention is quashed, the rule nisi made absolute and the petitioner is directed to be released forthwith."

These considerations also emphasize the necessity for an affidavit in opposition by the Deputy Minister upon whose subjective satisfaction the detention order was passed. But there was none.

The only affidavits relied on, in lieu thereof, were those affirmed to by Encik Ibrahim Bin Abdullah whose duty it was to process the applicant's case file and put up a summary thereon showing the points for and against the applicant. He has not said that he was authorized to swear these affidavits nor has he offered any explanation for the absence of an affidavit in opposition by the Deputy Minister. It is also clear that the contents of his affidavit as to how the Deputy Minister came to make the detention order are based on guesswork.

Where, of course, satisfactory reasons are offered for the absence of the Deputy Minister's affidavit (*Ranjit* v. *State of W.B.*,[22] *J.N. Roy* v. *State of W.B.*[23]), an affidavit by a responsible officer who personally dealt with or processed the detainee's case would be acceptable: *Samaresh* v. *D.M.*[24]

I hasten to add, however, that the absence of the Deputy Minister's affidavit in this case, even though unexplained, does not *ipso facto* vitiate the detention order. But it is a factor, amongst others, in the light of which the contention that there was non-compliance with the conditions precedent laid down in section 4(1) is to be appreciated.

As Sakaria J. said in *Dulal Roy* v. *The District Magistrate, Burdwan And Others*[25] at p. 840:

"This court has time and again emphasized that where in a *habeas corpus* petition a rule nisi is issued, it is incumbent upon the state to satisfy the court that the liberty of the detenue has been taken away strictly in accordance with law and due compliance with the constitutional requirements of Article 22(5) of the Constitution. The best informed person, therefore, to file the counter-affidavit in response to rule nisi is the authority who made the detention order under section 3 of the Act. In *Shark Hanif* v. *State of W.B.* [1974] 1 S.C.C. 637, it was pointed out that the failure to furnish the counter-affidavit of the authority who had passed the order of detention where *mala fides* or extraneous considerations are attributed to it, 'may assume the shape of serious infirmity leading the court to declare the detention illegal'."

Accordingly, I hold that the criminal activities alleged against the applicant are too remote in point of Law to justify the making of the detention order.

There is a final point worth mentioning.

I note that Encik Ibrahim also says at para. 5 of his affidavit affirmed to on April 2, 1986 (enclosure 8) as follows:

"On February 17, 1986, the applicant's case was referred to the Deputy Minister of Home Affairs. As the officer in charge of the case I studied the case file against the applicant and prepared a summary of the contents for the Deputy Minister, drawing his attention to the important aspects of the case for and against the applicant. The case file against the applicant was submitted together with my minute to the Minister. To the best of my knowledge and experience, the Minister reads the minute and if he considers necessary he would read the contents of the file or would call up for further particulars before making a decision. After careful consideration of the applicant's case, the Deputy Minister was satisfied as to the truth of the allegations against the applicant and considered that it was necessary, with a view to preventing the applicant from acting in a manner prejudicial to public order, that the applicant be detained and therefore directed that an order under section 4 of the Ordinance be issued against the applicant."

It appears, therefore, that although the case file against the applicant and the summary he prepared were sent to the Minister on February 17, 1986, it was the Deputy Minister who, in fact, considered the applicant's case and directed issue of the detention order dated the same day.

I am, therefore, left to guess whether the Deputy Minister had the opportunity of considering *all* the relevant material before making the detention order. But, I am not entitled to guess. Be that as it may, I mention this point only in passing and do not place any stress on it.

In all the circumstances, the application is allowed. *Habeas corpus* is granted and the applicant is directed to be released forthwith.

So much for this case. But in the wider public interest, I feel bound to ask myself whether the time is not now ripe for the Supreme Court to consider if the statement of the law in *Karam Singh* that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, is, after all, good law regard being had to recent English decisions of the highest authority to which I shall presently refer.

It is obvious from the judgments of their Lordships in *Karam Singh* that in arriving at their conclusion that the subjective satisfaction of the Minister is not justiciable heavy reliance was placed on the cases of *R.* v. *Halliday,*[26] *Liversidge* v. *Anderson*[2] and *Greene* v. *Secretary of State for Home Affairs.*[27]

In *Halliday*, the question for decision was whether a scheme of preventive detention promulgated in purported exercise of a power said to be conferred upon the King in Council under the Defence of the Realm Consolidation Act 1914 section 1(1) was valid. It was argued on his behalf that the order of preventive detention passed against him was unauthorized because the relevant statutory provision did not provide for it. The case therefore turned on a construction point.

In *Karam Singh* no question arose as to the validity of the scheme for preventive detention, the issue being whether it was for the detaining authority to show that the applicant was liable to be detained under it.

As for *Liversidge* v. *Anderson,* it is now forty-four years since that decision was given, the majority view finally interred and Lord Atkin's dissent vindicated in the House of Lords. I refer to the case of *R.* v. *Inland Revenue Commissioners, ex parte Rossminster*[28] where Lord Diplock remarked, pungently, at p. 1011:

"... the time has come to acknowledge openly that the majority of this House in *Liversidge* v. *Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."

Lord Scarman's salvo was delivered in these terms at p. 1025:

"The ghost of *Liversidge* v. *Anderson* [1942] A.C. 206 therefore casts no shadow upon this statute. And I would think it need no longer haunt the law. It was laid to rest by Lord Radcliffe in *Nakkuda Ali* v. *Jayaratne* [1951] A.C. 66, 77, and no one in this case has sought to revive it. It is now beyond recall."

The words of Lords Diplock and Scarman came as no surprise for some fifteen years earlier, Lord Reid in *Ridge* v. *Baldwin*[27] had said:

"I leave out of account the very peculiar decision of this House in *Liversidge* v. *Anderson.*"

And, in 1972 this is what Lord Roskill said in *The Secretary of State for Employment* v. *Associated Society of Locomotive Engineers And Firemen And Others*[30] at p. 74:

"Understandably in 1972 the Solicitor-General shrank from resting his main submission upon the view of the majority

in the House of Lords in *Liversidge* v. *Anderson* [1942] A.C. 206, especially in view of Lord Reid's comment upon that majority decision in *Ridge* v. *Baldwin* [1964] A.C. 40, 73. Adroitly he sought to found upon Lord Atkin's dissenting speech in *Liversidge* v. *Anderson* [1942] A.C. 206...".

Then, in *Reg.* v. *Secretary of State for the Home Department, ex parte Khawaja*[31] Lord Scarman took the opportunity of affirming his views, quoted above, in these terms:

"The classic dissent of Lord Atkin in *Liversidge* v. *Anderson* [1942] A.C. 206 is now accepted (*Reg.* v. *Inland Revenue Commissioners, ex parte Rossminster Ltd.* [1980] A.C. 952, 1011, 1025) as correct not only on the point of construction of regulation 18(b) of the then emergency Regulations but in its declaration of English legal principle. Lord Atkin put it thus, at p. 245: 'that in English law every imprisonment is *prima facie* unlawful and that it is for a person directing imprisonment to justify his act'."

And, at p. 344A he added:

"If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear."

It would appear, therefore, that a case could be cogently argued against the principles enunciated in *Karam Singh* and that the present case might perhaps provide the opportunity for this.

Application allowed.

Solicitors: *Yusof Lee Pathma & Marbeck.*

LIM KIT SIANG v. PEMANGKU KETUA POLIS DAERAH, BUTTERWORTH & ORS.

[O.C.J. (Edgar Joseph Jr. J.) May 12, 1986]

[Penang – Civil Suit No. 22-15-1986]

Civil Procedure – Application to strike out statement of claim and writ of summons – Whether applicants have a legal or equitable interest in the reliefs claimed by the plaintiff – R.H.C. 1980, O.18 r.19.

Mr. Lim Kit Siang, a member of Parliament and leader of the Opposition and the plaintiff in the present case, brought an action claiming in effect that he had been the victim of unfair discrimination in the matter of his application for a permit under section 27(1) of the Police Act 1967 to address an assembly of persons at a proposed political rally on March 7, 1986 at Butterworth. That application had been considered, first, by the Pemangku Ketua Polis Butterworth, the first defendant, and then on appeal, by the Pemangku Ketua Polis Pulau Pinang, the second defendant, and rejected. The plaintiff claimed that as a result there had been a violation of Article 8(1) of the Constitution. In the present case, two applications were made, the first by the fifth defendant, the Prime Minister, Malaysia and the second jointly by the fourth and seventh defendants, namely, Setiausaha, Kerajaan Negeri, Pulau Pinang and Government of the State of Penang, respectively, for orders that the writ of summons and statement of claim be struck out as disclosing no reasonable cause of action and as being frivolous, vexatious and an abuse of the process of the court under Order 18 rule 19 of the Rules of the High Court 1980 and under the interest jurisdiction of the court.

Held, allowing the two applications: (1) it is obvious from the affidavit evidence that the fifth defendant played no part in the consideration and rejection of the plaintiff's application for a permit both at first instance and at the appellate stage. He had no say in the matter at all. He was not even consulted upon it nor for that matter was it even alleged that he had any prior knowledge of it. The fifth defendant is therefore in no way legally or equitably interested in any of the reliefs claimed by the plaintiff within the meaning of the authorities cited;

(2) just like in the case of the fifth defendant, the fourth and seventh defendants have no legal or equitable interest in any of the reliefs claimed, especially as it concerns an event long since past and whose purpose has been achieved. Moreover, these defendants had no hand whatsoever in the grant of the permit concerned by the third defendant, Ketua Polis Daerah, Butterworth, to the fourth defendant, Setiausaha Kerajaan Negeri, Pulau Pinang.

Cases referred to:

(1) *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Company* [1892] 3 Ch. 274.
(2) *Tucker* v. *Collinson* 3 W.R. 354.
(3) *Wenlock* v. *Moloney* [1965] 1 W.L.R. 1238.
(4) *Nagle* v. *Feilden* [1966] 2 Q.B. 633.
(5) *Moore* v. *Lawson* (1915) 31 T.L.R. 418 (C.A.).
(6) *Drummond-Jackson* v. *British Medical Association* [1970] 1 W.L.R. 688.
(7) *Pegang Mining Co. Ltd.* v. *Choong Sam & Ors.* [1969] 2 M.L.J. 52.
(8) *In re I.G. Farbenindustrie A.G. Agreement* [1944] 1 Ch. 41, 42.
(9) *Gould* v. *National Provincial Bank Ltd. & Anor.* [1960] 1 Ch. 337, 341.
(10) *Heatley* v. *Newton* (1881) 19 Ch. D. 326, 336.
(11) *Amon* v. *Raphael Tuck & Sons Ltd.* [1956] 1 Q.B. 357.

CIVIL SUIT.

T. Selventhiranathan (Senior Federal Counsel) for the first, second, third, fifth and sixth defendants.

Mohd. Saari bin Yusoff (State Legal Adviser, Penang) for the fourth and seventh defendants.

Karpal Singh (*N. Shanmugam* and *Gooi Hock Seng* with him) for the plaintiff.

Cur. Adv. Vult.